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No. 692

In the Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, PETITIONER

vs.

GEORGE MAX CHARLES WOLFF

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

J. LEE RANKIN,
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GEORGE MAX CHARLES WOLFF

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Third Circuit affirming an order of the District Court for the Eastern District of Pennsylvania admitting respondent to citizenship.

OPINIONS BELOW

The opinion of the court of appeals (App. *infra*, pp. 11-16) is reported at 270 F. 2d 422. The opinion of the district court (R. 22-26) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1959 (App., *infra*, p. 17). On December 12, 1959, Mr. Justice Brennan extended the

time for filing a petition for a writ of certiorari to and including February 13, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, when the entire five-year period preceding a petition for naturalization falls after the effective date of the Immigration and Nationality Act of 1952, the residence requirements of the 1952 Act determine eligibility for naturalization, or whether the application may be considered under the Nationality Act of 1940 merely because the applicant lived in the United States prior to the effective date of the 1952 Act and prior to the five years preceding naturalization.

STATUTES INVOLVED

The Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U.S.C. 1101 *et seq.*, provides in pertinent part as follows:

Section 316(a), 8 U.S.C. 1427(a):

> No person, except as otherwise provided in this title, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing his petition for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years and during the five years immediately preceding the date of filing his petition has been physically present therein for periods totaling at least half of that time. * * *.

Section 405, 8 U.S.C. 1101 note:

(a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, * * * or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect * * * any status, condition, right in process of acquisition, act, thing, * * * or matter, * * * done or existing, at the time this Act shall take effect; but as to all such * * * statutes, conditions, rights, acts, things, * * * or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. * * *

(b) Except as otherwise specifically provided in title III, any petition for naturalization heretofore filed which may be pending at the time this Act shall take effect shall be heard and determined in accordance with the requirements of law in effect when such petition was filed.

* * * * *

The Nationality Act of 1940, 54 Stat. 1137, 8 U.S.C. (1946 ed.) 501 *et seq.*, as amended, provided in pertinent part:

Section 307(a), 8 U.S.C. (1946 ed.) 707(a):

No person, except as hereinafter provided in this Act, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing petition for naturalization has resided continuously within the United States for at least

five years and within the State in which the petitioner resided at the time of filing the petition for at least six months, (2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship * * *

Section 331, 8 U.S.C. (1946 ed., Supp. V) 731:

An applicant for naturalization shall make, under oath before, and unless prevented by sickness or other physical disability only in the office of, the clerk of court or such clerk's authorized deputy, regardless of the place of residence in the United States of the applicant, not less than two nor more than seven years at least prior to the applicant's petition for naturalization, and after the applicant has reached the age of eighteen years, a signed declaration of intention to become a citizen of the United States, which declaration shall be set forth in writing, in triplicate * * *.

Section 332, 8 U.S.C. (1946 ed., Supp. V) 732:

(a). An applicant for naturalization shall, not less than two nor more than seven years after such declaration of intention has been made, make and file in the office of the clerk of a naturalization court, in duplicate, a sworn petition in writing * * *.

STATEMENT

The respondent, a native of Germany and a citizen of Argentina, was admitted for permanent residence in the United States in April, 1948 (R. 1). He filed a declaration of intention to become a citizen on Sep-

tember 17, 1948 (R. 2-5), but did not apply for citizenship within seven years thereafter. His petition for naturalization was filed on July 10, 1958 (R. 6-11). The form which respondent signed contained an averment that he had been physically present in the United States for at least one-half of the five-year period immediately preceding the date of the petition (R. 9), but respondent's lists of arrivals and departures (R. 8) showed that he had been physically present in the United States for periods totaling only a little over nine months in the five-year period immediately preceding his petition. Respondent's absence was due to his employment as a sales representative in Mexico and South America for an American firm (R. 14).

The naturalization examiner filed objections to respondent's naturalization, pointing out that his 1948 declaration of intention had lapsed since not followed by a petition for naturalization within seven years (as required by Sections 331 and 332 of the Nationality Act of 1940, *supra*, p. 4); and that respondent did not meet the physical residence requirements of the Immigration and Nationality Act of 1952 for the five-year period immediately preceding his naturalization (R. 13-21).

The district court nevertheless admitted respondent to citizenship, holding that, since respondent had resided in the United States prior to the effective date of the 1952 Act (December 24, 1952), by virtue of the savings clause of that Act (Section 405, *supra*), his eligibility for naturalization was determined by the residence requirements of the 1940 Act.

The court of appeals affirmed the judgment of the district court. It recognized that respondent's declaration of intention had lapsed under the 1940 Act, but ruled that under this Court's decision in *United States* v. *Menasche*, 348 U.S. 528, he was nevertheless entitled to have his petition considered under the 1940 Act since he had resided in the United States before the effective date of the 1952 Act. The court noted that the result "is somewhat anomalous and it can be argued that this court is giving to Wolff the benefits of those provisions of both the 1940 Act and the 1952 Act which serve his purpose to acquire citizenship despite the fact that he is unable to literally comply with the provisions of either Act but we think the result is compelled by *Menasche*."

REASONS FOR GRANTING THE WRIT

The court of appeals has misinterpreted this Court's decision in *United States* v. *Menasche*, 348 U.S. 528, in a way which will engender confusion and disharmony in the application of the naturalization laws for years to come. The significant fact, which the court of appeals disregarded, is that under both the 1940 Act and the 1952 Act it is only the five-year period immediately preceding naturalization which is of importance in determining eligibility for naturalization. Here, unlike the situation in *Menasche*, the entire five-year period of residence preceding respondent's petition for naturalization occurred after the effective date of the 1952 Act. Respondent's application should therefore properly have been considered under the 1952 Act which was in effect throughout the determinative period.

In *Menasche*, this Court had before it an applicant who had filed a declaration of intention before the 1952 Act became effective and who already had 56 months of residence qualifying under the 1940 Act at the time the 1952 Act became effective. Four months later, having completed five years of residence, within seven years after his declaration of intention, Menasche applied for citizenship in April 1953. It is in that context that this Court's dictum, on which the court below relied, must be read. The Court said, 348 U.S. at p. 536:

> It could be argued in the present case that it was Menasche's residence, rather than his filing of the declaration, which gave rise to his rights under Section 405(a). And this approach would have the virtue of eliminating the inequitable treatment envisaged by the Government as regards those special groups of aliens who did not have to file declarations as a prerequisite to citizenship.[1] But while our decision could be rested on this ground, it is sufficient here merely to refer to the provision in Section 405(a), derived verbatim from Section 347(a) of the 1940 Act, preserving the "validity" of declarations of intention "valid at the time this Act shall take effect."

Giving this dictum as to residence its full effect, it means, we believe, no more than that, if any qualify-

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[1] This statement was in answer to the government's argument that Congress could not have intended to make the 1940 Act applicable to persons required to file a declaration of intention if that Act was not available to special classes, such as veterans, who were exempt from the declaration requirement under the 1940 Act.

ing period of residence had commenced to run before the effective date of the 1952 Act, the savings clause of the 1952 Act would operate to preserve the rights accruing from *that* residence under the former Act.[2] Thus, at most, under that dictum, any applicant whose five-year period of residence immediately preceding his petition for naturalization commenced before the effective date of the 1952 Act (December 24, 1952)—in short, any applicant who petitioned for naturalization before December 24, 1957—could have his citizenship determined under the 1940 Act. And, of course, an applicant who had filed a declaration of intention under the 1940 Act could under *Menasche* have his application determined under the 1940 Act so long as his petition was filed within seven years of the declaration. But where, as here, the declaration of intention has been allowed to lapse, and where the entire five-year period of residence relied upon to establish eligibility for citizenship falls after the effective date of the 1952 Act, there is nothing upon which the savings clause of the 1952 Act can operate. Neither the declaration of intention nor the residence prior to the five-year period has any significance in relation to the petition for naturalization filed, in this case, in 1958.

Such an interpretation fully protects any rights that can be said to have started to accrue before the 1952 Act went into effect. At the same time, it fixes a rea-

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[2] See *Shomberg* v. *United States*, 348 U.S. 540, 543, decided the same day as *Menasche*, where the Court said:

> We agree with petitioner that, absent a specific provision to the contrary, he has rights protected by § 405 (a). These stem from the filing of his Form N-400, from his petition for naturalization, and perhaps, *from his fulfillment of the five-year residence requirement*. • • •. [Emphasis added.]

sonable end to the period when naturalization will be administered under a dual set of laws. The purpose of the 1952 Act was to "repeal all immigration and nationality laws and to enact a completely revised immigration and nationality code" (S. Rep. No. 1137, 82d Cong., 2d Sess., p. 1). Under the interpretation of the court below, however, the 1940 Act will remain in effect so long as there is an alien alive who resided in the United States for any period of time before the 1952 Act became effective, even though he does not apply for citizenship until the year 2000 and even though admittedly the only relevant period of residence in such a case, under the standards of either Act, would be the period from 1995 to 2000.

For that reason, the question presented has continuing importance. The far-reaching interpretation of the 1952 Act's savings clause as basing rights upon mere residence in the United States prior to 1952, even though the residence is long prior to any controlling period in relation to the relief sought, could result in confusion and inequality of treatment, not only with respect to naturalization, but to deportation as well, since the savings clause applies to all aspects of the 1952 Act. The district courts have already shown considerable confusion as to the application of the savings clause and the *Menasche* dictum,[3] and a case similar

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[3] *Petition of Rosenbaum*, 171 F. Supp. 141 (S.D. N.Y.); *Petition of Zaharia*, 166 F. Supp. 314 (S.D. N.Y.); see also *In re Pinner's Petition*, 161 F. Supp. 337, 341 (N.D. Cal.). Other cases involving application of the *Menasche* dictum present the factual situation that part of the five-year residence preceding naturalization antedated the 1952 Act. *Aure* v. *United States*, 225 F. 2d 88 (C.A. 9); *Petition of Kaufteil*, 152 F. Supp. 538 (S.D. N.Y.); *Petition of Pauschert*, 140 F. Supp. 485 (S.D. N.Y.).

to the instant one is now pending before the United States Court of Appeals for the Second Circuit. *Petition of Medalion*, 173 F. Supp. 249 (S.D. N.Y.), presently on appeal by the government. That uncertainty will continue, we think, until the implications of this Court's dictum in *Menasche* have been clarified, and that can be done authoritatively only by this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. LEE RANKIN,
Solicitor General.

MALCOLM R. WILKEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

FEBRUARY, 1960.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 12,888

IN THE MATTER OF PETITION FOR NATURALIZATION OF GEORGE MAX CHARLES WOLFF

UNITED STATES OF AMERICA, APPELLANT,

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued June 12, 1959

Before BIGGS, *Chief Judge*, and McLAUGHLIN and STALEY, *Circuit Judges*

OPINION OF THE COURT

(Filed September 16, 1959)

By BIGGS, *Chief Judge*.

The appellee, Wolff, a native of Germany, was admitted for permanent residence in the United States in April 1948 and filed a declaration of intention to become a citizen of the United States on September 17, 1948, pursuant to the provisions of Section 331 of the Nationality Act of 1940, 8 U.S.C. Section 731 (1946 ed.). That statute provided that a petition for naturalization had to be filed within seven years of the date of filing of a declaration of intention or a petition for naturalization could not validly be filed. Wolff did not file a petition for naturalization until July 16, 1958. The Nationality Act of 1940 was repealed by the Immigration and Nationality Act of 1952, 8 U.S.C.A., Section 1101 *et seq.*, and Section 334(f) of that Act, 8 U.S.C.A.

Section 1445(f) dispensed with the filing of a declaration of intention as a prerequisite to citizenship.

The 1952 Act worked other changes in respect to requisites for admission to citizenship. It provided for five years residence in the United States by the applicant and also that the applicant must be physically present therein for at least two and one half years prior to the filing of his petition for naturalization. 8 U.S.C.A., Section 1427. It is conceded by Wolff that he cannot meet the latter requirement since he has been physically present in the United States for only about nine months in the five years preceding the filing of his petition.[1] An Examiner of the Immigration and Naturalization Service deemed this fact to bar Wolff from citizenship. Wolff sought review in the court below which held he was entitled to citizenship. F. Supp. (19). The appeal at bar followed.

Wolff contends that by virtue of the provisions of Section 405(a) of the 1952 Act, 8 U.S.C.A., Section 1101 note, the so-called "savings clause", he acquired a "status", a "condition" or "right in process of acquisition", which validates his petition for naturalization and entitles him to citizenship. Section 405(a) provides: "Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution,

[1] The reason for this is that Wolff is and was employed as a salesman for an American locomotive company in South America and spends much of his time there.

suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes [*sic*[2]], conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. . . ."

Wolff's contention is based on language in the opinion in United States v. Menasche, 348 U.S. 528, 536 (1955) as follows: "It could be argued in the present case that it was Menasche's residence, rather than his filing of the declaration, which gave rise to his rights under Section 405(a). And this approach would have the virtue of eliminating the inequitable treatment envisaged by the Government as regards those special groups of aliens who did not have to file declarations as a prerequisite to citizenship. But while our decision could be rested on this ground, it is sufficient here merely to refer to the provision in Section 405(a), derived verbatim from Section 347(a) of the 1940 Act, preserving the 'validity' of declarations of intention 'valid at the time this Act shall take effect.'"

The argument advanced by Wolff and accepted by the court below runs as follows, as we grasp it. Menasche was admitted for permanent residence in the United States on March 7, 1948, and in the following month filed his declaration to become a citizen. He was absent from the United States for various periods, aggregating some forty-four months, but he did not at any time abandon his American residence. Under the National-

[2] Undoubtedly, the word intended was "statuses".

ity Act of 1940 he would have been entitled to have been naturalized on completing five years of residence on March 7, 1953. But before this five year period could elapse the Immigration and Nationality Act replaced the 1940 Act on December 24, 1952. The 1952 Act imposed the necessity of physical presence for at least one half of the five year residence period. It was clear, therefore, as was said in *Menasche*, that if the 1952 Act applied to his case he could not be naturalized while if the provisions of the 1940 Act were applicable he was eligible for citizenship. The Supreme Court, however, stated categorically, albeit by way of dictum, that a decision in Menasche's favor could have been rested on residence rather than the filing of a declaration of intention.

Wolff asserts that because he has met the residence requirements of the 1940 Act he is entitled to citizenship, despite the fact that he cannot meet the physical presence requirement of the 1952 Act and did not file his petition for naturalization within the seven years required by the 1940 Act. Phrasing his contentions in another way, he states, in substance, that his residence in the United States gives him status, a right to citizenship in process of acquisition, and that under *Menasche* it is residence that counts. Thus, says Wolff, does Section 405(a) preserve his right to citizenship.

The United States asserts, however, that while Section 405(a) preserves status for citizenship and rights in process of acquisition under the 1940 Act, Wolff's rights have been lost because he failed to file his petition for naturalization within seven years of the time of filing his declaration. In other words says the United States, Wolff's right to proceed to citizenship under the 1940 Act has been lost for failure to comply with the seven-year proviso of that statute. He must, therefore, proceed under the 1952 Act and he cannot meet the physical presence requirement of that statute.

The decision of the Supreme Court in *Menasche*[3] seems to require a result different from that contended for by the United States. Mr. Justice Clark stated in the Menasche opinion, quoted above, that the decision of the Court could be based on Menasche's residence rather than on the filing of his declaration of intention to become a citizen and that it was residence rather than the filing of the declaration which gave rise to his rights under Section 405(a). If we correctly construe the dictum in *Menasche* it would mean that residence alone must be deemed to be a status, an essential part of a right to citizenship in process of acquisition and that anyone who had acquired residence under the 1940 Act may proceed under that statute to citizenship. It follows that since Wolff possesses residence status under the 1940 Act,[4] and residence was stated in *Menasche* as being the basis upon which the decision in that case could have been rested, it is our opinion that Wolff is entitled to citizenship. Strict compliance with the 1940 Act would, of course, require him to file a new declaration of intention and then wait two years before filing his petition for naturalization. But this would seem to be a futility under the circumstances of the case at bar in view of the fact that the 1952 Act has dispensed with the requirement of declaration of intention to become a citizen.

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[3] Menasche had complied with all of the provisions of the 1940 Act. He had filed his petition for naturalization within the time prescribed by that statute. It is in this respect only that the circumstances of the case at bar differ substantially from those of *Menasche*.

[4] See 8 U.S.C. § 707 (1946 ed.) which provides in part:

"(a) No person except as hereinafter provided in this chapter, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing petition for naturalization has resided continuously within the United States for at least five years . . ."

The result we concede is somewhat anomalous and it can be argued that this court is giving to Wolff the benefits of those provisions of both the 1940 Act and the 1952 Act which serve his purpose to acquire citizenship despite the fact that he is unable to literally comply with the provisions of either Act but we think the result is compelled by *Menasche*.[5]

That the United States is entitled to maintain its appeal to this court from the decree of naturalization despite the delivery of a certificate of citizenship to Wolff is so well established that no extensive citation of authorities is necessary in support of that proposition. But see United States v. Morena, 245 U.S. 392 (1918) and United States v. Ovens, 13 F.2d 376 (4 Cir. 1926).

The judgment will be affirmed.

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[5] See 8 U.S.C. § 731 (1946 ed.)

We are, of course, troubled by the statement in *Menasche*, 348 U.S. at p. 530: "Thus, if the 1952 Act applies to respondent's case, it is clear that he may not be naturalized, while under the 1940 Act he is admittedly eligible for citizenship." It should be borne in mind, however, as Mr. Justice Clark pointed out in connection with the application of Section 405(a), 348 U.S. at p. 538, that "'The cardinal principle of statutory construction is to save and not to destroy' " citing Labor Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1927). Mr. Justice Clark went on to say: "It is our duty 'to give effect, if possible, to every clause and word of a statute.' " citing Montclair v. Ramsdell, 107 U.S. 147, 152 (1882).

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 12,888

In the Matter of the Petition for Naturalization of GEORGE MAX CHARLES WOLFF

UNITED STATES OF AMERICA, APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: BIGGS, Chief Judge, and MCLAUGHLIN and STALEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court in this case be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF,
Clerk.

September 16, 1959

Received & Filed September 16, 1959. Ida O. Creskoff, Clerk.

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October Term, 1959.

UNITED STATES OF AMERICA,
Petitioner,

vs.

GEORGE MAX CHARLES WOLFF.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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March, 1960.

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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1959.

No. 692.

UNITED STATES OF AMERICA,

Petitioner,

vs.

GEORGE MAX CHARLES WOLFF.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the court of appeals (App. pp. 11-16) is reported at 270 F. 2d 422. The opinion of the district court (R. 22-26) is not reported.

JURISDICTION.

The order of the district court was entered on January 13, 1959 (R. 27). Thereafter, in accordance with said order respondent took the oath of allegiance to the United States on January 16, 1959, and a naturalization certificate was issued to him (R. 11, 12, Resp. pp. 8-10). An appeal was taken to the court of appeals on March 12, 1959 (R. 28, 29) and judgment of the court of appeals was entered on September 16, 1959 (App. p. 17). Thereafter, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including February 13, 1959. The oath of allegiance having been given to the respondent and a certificate of naturalization having been issued, this Court does not presently have jurisdiction in the matter.

QUESTIONS PRESENTED.

Whether an order granting naturalization upon the taking of the oath of allegiance is no longer appealable after the said oath is taken and the respondent has renounced all allegiance and fidelity to any foreign government and has received his naturalization certificate.

Whether residence in the United States prior to the effective date of the Immigration and Nationality Act of 1952 is a status, condition, or right in process of acquisition which is preserved by the Immigration and Nationality Act of 1952, Section 405(a), 8 U. S. C. 1101, so that said person may obtain the benefits of the Nationality Act of 1940.

STATUTES INVOLVED.

The pertinent provisions of the Immigration and Nationality Act of 1940 and 1952 that are involved are set forth in the petition for a writ of certiorari on pages 2-4.

STATEMENT OF THE CASE.

The respondent, a native of Germany and a citizen of Argentina, was admitted for permanent residence in the United States in April, 1948 (R. 1). He filed his declaration of intention to become a citizen on September 17, 1948 (R. 2-5), and filed his petition for naturalization on July 16, 1958 (R. 6-11). His petition form correctly listed all of his absences from the United States (R. 8) showing that he was physically present in the United States approximately nine months in the five-year period immediately preceding his petition. During the period he was out of the United States he was employed by the Baldwin-Lima-Hamilton Corporation as a sales and service representative to Mexico and South America and all of his absences were pursuant to his employment (R. 14). He had always paid his taxes and has done everything necessary to continue his permanent residence status in the United States (R. 14-15).

Over the objections of the naturalization examiner the district court granted the petition for naturalization, stating that under the savings clause of the Immigration and Nationality Act of 1952, Section 405, his residence was sufficient to preserve his status, and, therefore, the residence requirements should be determined under the 1940 Act (R. 22-26). Thereafter, an order was entered granting the respondent's naturalization upon taking the oath of allegiance in accordance with law (R. 27).

On January 16, 1959, in accordance with the aforesaid order, respondent took the oath of allegiance to the United States and renounced all allegiance and fidelity to any foreign government (R. 11, 12), and a certificate of naturalization (No. 8105882) was issued to him on January 16, 1959 (Res. pp. 8-10).

The court of appeals rightfully affirmed the judgment of the district court on the merits and, thereafter, this petition for a writ of certiorari was filed.

REASONS FOR DENYING THE WRIT

I. THE COURT DOES NOT HAVE THE JURISDICTION TO HEAR THIS MATTER

This is an appeal from the order of the district court granting naturalization of the respondent upon taking the oath of allegiance in accordance with law. In the case at bar *Wolff*, shortly after the said order was entered, appeared before the court and was permitted to surrender his citizenship irrevocably to the country to which he owed allegiance at this time.[1] In the event that it should now be determined as a matter of law that the respondent was not entitled to United States citizenship, this would in no way effect his unequivocal renunciation of his existing right of citizenship in another country and would place him in a position of not only being stateless but of being unable to obtain any travel document to continue in his job. The Immigration and Nationality Act of 1952 quite clearly sets forth the procedure to be followed to cancel a certificate of citizenship.[2] It is questionable, as a matter of law, whether

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[1] (R. 11) where the oath states . . . "I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state or sovereignty of whom or which I have heretofore been a subject or citizen."

[2] Immigration and Nationality Act of 1952, Sec. 340, 8 U. S. C. 1451 et seq.

the reversal of the order of the lower court by itself would give any right to cancel this certificate which has been issued to him upon the administration of the oath. The government here has not taken any of the steps or followed any of the procedure for an action of revocation of said certificate.

It is conceded that the right of appeal does exist in naturalization cases.[3] These cases are all distinguishable, however, as at no time was the question specifically before the court after the oath had been rendered at a date subsequent to the said order and the party has surrendered his foreign citizenship and has been issued a United States naturalization certificate.

Surely the issue is moot and the appeal not timely, after the oath of citizenship has been rendered, and a certificate of naturalization issued.

II. THERE IS NO CONFLICT OF DECISION BEFORE THE COURT.

The only conflict that exists is a continuous refusal of the appellant to accept the law as it is enacted and as it has been interpreted. The courts below have all properly interpreted *U. S. v. Menasche*[4] and have properly determined that Section 405 of the Immigration and Nationality Act of 1952 preserves status, rights and conditions that existed on the effective date of the aforesaid act without any limitation as to the time.[5]

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[3] **Tutun v. U. S.**, 270 U. S. 568 (1926); **Bindczyck v. Finucane**, 342 U. S. 76.

[4] **United States v. Menasche**, 348 U. S. 528 (1955)

[5] See **Petition of Rosenbaum**, 171 F. Supp. 141 (S. D. N. Y.), where the facts set forth are similar to the facts at bar. Petition filed in 1958, and the court determined that residence was sufficient to preserve status; **Petition of Zaharia**, 161 F. Supp. 314 (S. D. N. Y.); **In re Pinter's Petition**, 161 F. Supp. 337, 341 (N. D. Cal.); **Petition of Kauftail**, 152 F. Supp. 538 (S. D. N. Y.); **Petition of Pauschert**, 140 F. Supp. 485 (S. D. N. Y.); and **Aure v. United States**, 225 F. 2d 88 (C. A. 9)

III. ON THE MERITS, THE DECISION OF THE COURT BELOW IS CLEARLY CORRECT.

The court below correctly and clearly interpreted the leading case on this question. The court gave full cognizance and full authority to the language in *United States v. Menasche*, at page 536, where it was said: "It could be argued in the present case that it was Menasche's residence, rather than his filing of the declaration, which gave rise to his rights under Section 405(a). And this approach would have the virtue of eliminating the inequitable treatment envisaged by the Government as regards those special groups of aliens who did not have to file declarations as a prerequisite to citizenship." Here, like *Menasche*, *Wolff* was admitted to the United States for permanent residence prior to the effective date of the 1952 Act and had certain rights that were preserved and protected. The Supreme Court in its dictum did not use mere words but stated sound valid law of binding effect upon the courts below. The appellant now sets forth the unrealistic argument that while it is true that residence is a sufficient status to be preserved by the savings clause under the 1952 Act that there should be a cut-off date of December 24, 1957, and that by the respondent not filing his petition prior to that time, he is not eligible to file under the Act of 1940.

It is the duty of the courts to interpret the law. It is the duty of the legislature to enact the law. Nowhere under Section 405 of the Immigration and Nationality Act of 1952 does it state the length of time for which the right or status shall be preserved. It states that any status, condition or right in process . . . "unless otherwise specifically printed therein is hereby continued in force and effect." Congress, as stated in *Menasche*, did not intend to strip aliens of advantages given under prior acts but rather to preserve rights accruing in the prepetition stages of the naturalization process. If it was the intention of Congress to have

a cut-off date for said rights, this could have and should have been enacted in the statute. The court has previously determined that Naturalization Acts are permissive and that they do not require an alien to apply for citizenship within any prescribed time after he becomes qualified to do so.[6]

The appellant has also raised the issue as to whether the court below properly determined that the respondent would not have to file a new declaration of intention. The right to naturalize is a matter of substantive law. The question of a declaration of intention is a matter of procedural law.[7] Rights preserved continue under present day procedure and the courts do not require needless, antiquated steps to be taken. Thus, the court of appeals properly determined that the residence requirements of the respondent should be determined under the 1940 Act, and that his petition should be determined by the procedure in effect at the time of the filing of the petition for naturalization.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that a petition for a writ of certiorari be denied.

Respectfully submitted,

GEORGE GERSHENFELD,
Attorney for Respondent.

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[6] **Krausse v. United States,** 194 F. 2d 440 (2d Cir.)

[7] **In re Pinner's Petition,** 161 F. Supp. 337 (N. D. Cal.)

APPENDIX

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

In the Matter of GEORGE MAX CHARLES WOLFF PETITION FOR NATURALIZATION. } Petition No. 212562.

STIPULATION OF COUNSEL.

AND NOW, to wit: this 12th day of August, 1959, it is stipulated and agreed by and between GEORGE GERSHENFELD, attorney for petitioner, and HAROLD K. WOOD, United States Attorney for the Eastern District of Pennsylvania, and JAMES P. DORNBERGER, Assistant United States Attorney for the said District, as follows:

1. That the photostatic copy of the Certificate of Naturalization, attached to this Stipulation as Exhibit "A" and by reference made a part hereof, is a true, correct and certified copy of the duplicate original Certificate of Naturalization No. 8105882 issued to George Max Charles Wolff by the Clerk of the United States District Court for the Eastern District of Pennsylvania on January 16, 1959.

2. That the said photostatic copy of the duplicate original Certificate of Naturalization attached hereto as Exhibit "A" was prepared and issued contemporaneously with the origi-

nal Certificate of Naturalization issued to the petitioner and conforms to the original Certificate of Naturalization in all material respects.

3. That said photostatic copy of the duplicate original Certificate of Naturalization attached hereto as Exhibit "A" may be admitted into evidence in the above-captioned matter.

GEORGE GERSHENFELD,
Attorney for Petitioner.
HAROLD K. WOOD,
United States Attorney.
JAMES P. DORNBERGER,
Assistant United States Attorney.

UNITED STATES OF AMERICA.

DEPARTMENT OF JUSTICE.

IMMIGRATION AND NATURALIZATION SERVICE.

August 10, 1959

CERTIFICATION.

BY VIRTUE OF the authority vested in me by Title 8, Code of Federal Regulations, Part 103, a regulation issued by the Attorney General pursuant to Section 103 of the Immigration and Nationality Act,

I HEREBY CERTIFY that the annexed documents are originals, or copies thereof, from the records of the said Immigration and Naturalization Service, Department of Justice, relating to George Max Charles Wolff, File No. A-6,666,284, of which the Attorney General is the legal cus-

todian by virtue of Section 103 of the Immigration and Nationality Act.

In Witness Whereof I have hereunto set my hand and caused the seal of the Department of Justice, Immigration and Naturalization Service to be affixed, on the day and year first above written.

J. W. HOLLAND
District Director
Immigration and Naturalization Service
Philadelphia 6, Pa.

SEAL

Attached to preceding certification is,

Duplicate Original Certificate of Naturalization No. 8105882, Petition No. 212562, dated 16th day of January, nineteen hundred and fifty-nine (1959), signed by Gilbert W. Ludwig, Clerk of the U. S. District Court, by W. N. Prender, Deputy Clerk.

FILE COPY

Office-Supreme Court, U.S.
FILED
MAR 18 1960
JAMES R. BROWNING, Clerk

No. 692

In the Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, PETITIONER

v.

GEORGE MAX CHARLES WOLFF

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D.C.

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 692

UNITED STATES OF AMERICA, PETITIONER

v.

GEORGE MAX CHARLES WOLFF

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

In response to the petition for a writ of certiorari in which the government contends that the court below misapplied applicable statutes and legal principles in finding that respondent was eligible for citizenship, respondent suggests that the case is moot since he has already taken the oath of allegiance and been admitted to citizenship.[1] He argues that his citizenship can be taken away only by a proceeding for revocation under Section 340(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1451(a). That very section

[1] Respondent took the same position before the court of appeals on argument. That court ruled against him, *sub silentio*, by considering the merits of the government's appeal, although it ruled against the government on the merits.

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of the Act, however, provides in subsection (j) as follows:

> Nothing contained in this section shall be regarded as limiting, denying, or restricting the power of any naturalization court, by or in which *a person has been naturalized*, to correct, reopen, alter, modify, or *vacate its judgment or decree naturalizing such person*, during the term of such court or *within the time prescribed by the rules of procedure* or statutes governing the jurisdiction of the court to take such action. [Emphasis added.]

The enactment of this provision was occasioned by the decision of this Court in *Bindczyck* v. *Finucane*, 342 U.S. 76, that a naturalization court did not have power to set aside a certificate of naturalization by a motion to vacate during the term of court. Such a power now exists under this subsection (j). And if a district court now has power to set aside naturalization on a petition for rehearing before appeal, it must also have power to vacate an order of naturalization pursuant to the mandate of an appellate court where an appeal has been taken in accordance with the rules of procedure applicable to that court.

Even without this provision in the 1952 Act, there would be no merit in petitioner's position. Since *Tutun* v. *United States*, 270 U.S. 568, 575, it has been established that there is a right of appeal from an order granting or denying naturalization. Both the majority and dissenting opinions in *Bindczyck* recognized that an appeal might involve vacation of naturalization (see 342 U.S. at pp. 86–87, 95–96). Courts of appeals have taken cognizance of appeals by the

United States after the taking of the oath of allegiance and admission to citizenship. See *United States* v. *Cunha*, 209 F. 2d 326, 327–328 (C.A. 1).

The judgment that an alien be admitted to citizenship carries with it permission to take the oath. It is a general principle that obedience to a judgment does not prevent review of the propriety of the issuance of that judgment. Thus, payment of a money judgment does not render the issue of liability moot (*Cahill* v. *New York, New Haven & Hartford Railroad Co.*, 351 U.S. 183); lifting of a boycott in obedience to an injunction pendente lite does not render moot an appeal from that injunction (*Bakery Drivers Union* v. *Wagshal*, 333 U.S. 437, 442); release from custody pursuant to a writ of habeas corpus does not render the proceeding moot, where, if reversed, the relator can be taken back into custody (*Eagles* v. *Samuels*, 329 U.S. 304). Since here the government contests the propriety of the order admitting respondent to citizenship, the controversy has not been rendered moot by virtue of his admission to citizenship under that judgment.

Respondent's position that admission to citizenship bars review of the judgment declaring that the alien be admitted to citizenship would be so contrary to established principles and practice that this in itself would be a question warranting consideration by this Court.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

MARCH 1960.